United Food and Commercial Workers, Local 1776, AFL–CIO *and* Elizabeth Ann Murphy

United Industrial, Service, Transportation, Professional and Government Workers of North America, of the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL–CIO *and* Elizabeth Ann Murphy. Cases 4–CA–25215 and 4–CB–7752

June 15, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On February 3, 1998, Administrative Law Judge Michael O. Miller issued the attached bench decision. The General Counsel filed exceptions and a supporting brief, in which the Charging Party joined. Each of the Respondents filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Bruce G. Conley, Esq., for the General Counsel.
Laurence M. Goodman, Esq. and *Deborah R. Willig, Esq. (Willig, Williams & Davidson)*, for the Respondent Employer.
Stanford Dubin, Esq., for the Respondent Union.
Frank Finch III, Esq., for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 14 and 15, 1998, based on a charge filed by Elizabeth Ann Murphy, an individual, on August 23, 1996, as thereafter amended, and a complaint which issued on March 31, 1997, as amended at hearing. The amended complaint alleges that United Food and Commercial Workers, Local 1776, AFL–CIO (Respondent Employer) violated Section 8(a)(1), (3), and (4), and United Industrial, Service, Transportation, Professional and Government Workers of North America, of the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL–CIO (Respondent Union) violated Section 8(b)(1)(A) by conditioning pay raises for Murphy on her retirement, threatening to revoke pay raises unless she retired, and revoking those raises on her failure to do so because of her union and other protected activities and because she had filed charges and given testimony under the Act. The answers timely filed by both Respondents denied the commission of any unfair labor practices. All parties were afforded the opportunity, after all evidence had been received, to present oral arguments as to the factual and legal arguments raised by the complaint.

Based on my review of the evidence, observations of the witnesses and their demeanor, and consideration of the parties' oral arguments, I issued a bench decision at the close of the hearing. In that decision, which I certify to have been accurately reproduced at pages 293 through 301 of the transcript, attached as ''Appendix A,''[1] I found that Respondent Employer had not violated Section 8(a)(1), (3), or (4),[2] and that Respondent Union had not violated Section 8(b)(1)(A) by agreeing to provisions which granted Murphy wage increases that were different from those granted to other employees and were conditioned on her retirement approximately 2 years from the date of the agreement. I also found that Respondent Employer had not violated the Act by advising Murphy that if she did not retire her wage increases would be revoked or by revoking those increases when she did not retire.

CONCLUSION OF LAW

Based on the entire record, I find that Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Respondent Union is a labor organization within the meaning of Section 2(5) of the Act. I further find that the Respondents have not violated the Act in any manner alleged in the complaint as amended.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

[1] Certain errors in the transcript have been noted and corrected.

[2] At the outset of the hearing, I rejected Respondent Employer's motion to defer this dispute to arbitration. The complaint alleges a violation of Sec. 8(a)(4), which is intertwined with the other allegations in that pleading. The Board will not defer alleged violations of Sec. 8(a)(4) to arbitration in order that it may protect the integrity of the statutory rights granted employees under the Act. *Wabeek Country Club*, 301 NLRB 694 fn. 1, 699 (1991).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX A

BENCH DECISION

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JUDGE MILLER: On the Record. This is a bench decision in the above-captioned case. Based on the testimony I've heard over the last day and a half, my observation of the witnesses and their demeanor, and the oral arguments presented by all counsel, I find the following.

Complaint alleges and both Respondents admit the facts which establish and I find Respondent Employer is an Employer engaged in commerce within the meaning of Section 2(2),(6), and (7) of the Act, and Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

I find the following to be the relevant facts herein. Elizabeth Ann Murphy (hereinafter called ''Murphy'') has been a clerical employee of Respondent Employer and a member of

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the clerical bargaining unit represented by Respondent Union since 1967. There was no question but that Murphy has over the years engaged in excessive—excuse me—extensive protected activity.

She was the charging party in a 1984 Board case filed in 1981 finding that the Employer had discriminatorily threatened, warned, forced her to undergo a psychiatric exam, and discharged for the apprisal of her leadership activities in support of a 1981 strike. In a word, in that case, she had been treated shabbily. That matter was not finally resolved until 1993, although she was reinstated in 1986 or 1987.

She was also, of course, the party involved in the back pay proceeding arising out of that case which was extensively litigated for years thereafter. In the second Board decision in the back pay case, she was entitled to more than $100,000 in back pay and other losses.

Since her successful prosecution of those charges and her return to work, she has filed numerous NLRB charges and charges with other agencies against both her Employer, and in some cases, against her collective bargaining representative for whom she was also the Union steward. Until this present set of charges, however, her prior charges had all been dismissed and the dismissals upheld by the General Counsel in Washington.

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After her return to work for Respondent Employer, Murphy was the highest paid employee in what was basically an entry level job. Because of her wage rate and in order to not increase the rate for that particular job, the Employer and the Union agreed in three successive collective bargaining agreements that rather than receive wage increases paid to other employees, she would receive equivalent amounts in annual bonuses paid to her each year

This gave her the advantage of receiving the money in a lump sum up front at the beginning of each contract year. It was, however, to her disadvantage in that the pension to which she would otherwise be entitled was based on a percentage of her high four years of salaries not including such bonuses. The bonus arrangement was agreed to in collective bargaining and has never been found by the Board as discriminatory or in breach of Respondent Union's obligations to her under their duty of fair representation.

I note that she was reinstated to the same job, essentially the same job she held before her discharge. I also note that although the contract in each term provided that she would receive bonuses rather than wage increases, it did not refer to her by name but by category of pay level. And in fact, in some cases, particularly in the last few years, she did receive some of the wage increases.

In 1996, at or just before the beginning of

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negotiations, Ms. Murphy approached her Employer, particularly Mr. Wooden, and ask that she receive wage increases rather than bonuses specifically because this would increase her retirement benefits, and she planned to retire in two years. She was told to put that request in writing, and she did so. She was also told quite appropriately that this was a matter for collective bargaining.

She wrote on her request expressing again her plan to retire in about two years. During collective bargaining I find with Murphy present as one of the Union's bargaining committee, the Employer proposed that all of the employees get a $25 per week raise each of the three years except for Mrs. Murphy. I find that for Mrs. Murphy it proposed in lieu of the bonuses which had been the practice to give her wage increases in each of the first two years with the understanding that she would be retiring on December 31, 1997. This was agreed to and ratified.

I find it was a valid contract. And so finding, I credit Ms. Schwartz and Mr. Wooden whose recollections of the events I find to be superior to those of Mrs. Murphy. I note that Ms. Coffin only testified that she did not recall such discussions. She did not deny that such discussions occurred, and in fact, Ms. Coffin signed the memorandum of understanding after reading it which embodied these terms.

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I find insufficient evidence on this record to discredit the notes of either Ms. Schwartz or Mr. Scadaro concerning the negotiations.

When the date of the anticipated retirement approached, Respondent Employer was advised—excuse me—Respondent Employer advised Murphy that if she did not retire, the wage increases given in 1996 and 1997 would be revoked. They were, in fact, revoked when she did not retire. She has continued to work at the weekly salary she had been paid before those wage increases in the 1996 contract. This would be a very different case, I find, if they had insisted upon her retirement and not allowed her to continue to work.

I've analyzed this case under the *Wright Line* [251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 393 (1983)] mode of analysis. I find that there is Union and other protected activity, however, much of it is remote in time. Some of it is more recent. There was certainly extensive animus reflected in the original case, but I note that the individuals involved in that case who displayed that animus were not involved in any way in the actions involved in this case or allegedly—this case.

For the purposes of this discussion, I'm willing to assume that the persons with whom Ms. Murphy dealt, her superiors,

may have been relieved to learn that she planned to retire. That, as I have found in prior cases,

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particularly *Jordan Marsh Stores Corp*., 317 NLRB 460, 476 (1995), is not a basis for finding animus or finding conduct violation. I cannot find anything in this record that reveals the sort of animus which might establish a willingness or a proclivity to violate the Act with respect to her or force her to retire or otherwise discriminate against her.

Was she isolated in her work? Yes. Was that the result of a Union activity? I cannot find that. It is not proven that this action was taken or that she was isolated because of her Union activities. The record established she lacked the skills to do the work in Morristown, and the Employer kept her in a job at a higher rate of pay than the job otherwise called for at a site that the Employer had reason to continue in operation.

I note that neither the isolation nor the bonus arrangement was argued or found to be a denial in—of the back pay case, and has never been found to be a violation to this day. Did the Employer do an end runaround Ms. Murphy in having Coffin sign the memorandum of understanding? No evidence establishes that it did. It was logical to have Coffin sign that memorandum of understanding because she was at the facility where Schwartz was when she prepared it, and that understanding was shown to Ms. Murphy shortly thereafter.

Their failure to include Ms. Murphy on the telephone

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list, that's questionable, but not necessarily animus. There's no probative evidence of discrimination regarding the telephone, the denial of a telephone at her desk alluded to by General Counsel in his closing arguments. There is no evidence that any of that is discriminatory. I also find no; animus in the dispute over the silver anniversary pay raise. I find that Ms. Murphy was simply wrong in her belief that she was entitled to it, and Mr. Wooden's responses to her did not reflect any animus. Rather, her letter to him reflects a hostility on her part.

Could the Employer have interpreted her request differently to mean something other than a December 31, 1997 retirement? Probably. Was it unreasonable for them to interpret it that way? No. Frankly, I'd be a little bit more comfortable if the raise had been continued through the beginning of March which is another interpretation that could have been given to her request, but I don't find the failure to do so to be evidence of animus or discriminatory.

The insistence upon maintaining the essence of paragraph 4 of the memorandum of understanding of merely eliminating her name from the contract seems to be consistent with the prior agreements. There raises some questions in mind. It is a little bit suspicious, but the memorandum of understanding was consistent with what I find to have been agreed to at the bargaining table and not

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subject to being revised at the stage that the parties had already agreed to the terms of the contract.

I find no discrimination in refusing to strike that paragraph even if that was what she really wanted. In fact, I think that would have left her hanging in limbo with either no bonus and no raise, or with a raise to which the parties never intended to agree. Therefore, I find there is no animus such as would support a finding of violation in this case. More significantly, I find that there was no adverse action taken against Ms. Murphy, even though I'm sure she believes that there was.

She asked for a change in how she's going to be compensated to accommodate her plans to retire. The Employer proposed a reasonable accommodation because of those stated intentions, and her bargaining representative agreed to it. This action was taken—excuse me. The action taken to revoke the wage increase was not retaliatory when she decided not to retire, but was consistent with the terms of the contract. To the—I find a meeting of the minds between the Union and the Employer on that contract. The employees may have misunderstood or perhaps changed their minds, but they're not in a position to question that or raise the question of meeting of the minds. The parties here are the Employer and the Union.

Finding neither animus nor adverse action, I find no

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violation of Section 8(a)(3) and (1) of the Act in the revocation of the wage increase or statements that were intended to do so. It was not unlawful to take the action, therefore, it was not unlawful to tell her that they were going to take the action.

I find no breach in the duty of fair representation in negotiating this agreement on the behalf of the entire unit. The actions of the Union in negotiating that agreement I find, based on a reasonable interpretation of her wishes. I also find that I cannot make any findings concerning any other statutes that's outside my authority.

Accordingly, I recommend dismissal of all of the allegations of the Complaint as amended. In due course, I will certify the record and this decision to the Board with such changes and corrections I deem necessary. A written decision and order encompassing that and regarding this spoken decision will issue at that time, and it's from that time that the time of filing exceptions will run. That concludes my bench decision. Thank you.